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of the realty owner. Hence, any policy which tends to favor either party works a legal injustice to the other. It is readily seen that the doctrine of constructive annexation is based entirely upon the intent of the chattel owner to add to the realty in the future. But the basis of the landlord's claim to the fixture in any case is that they have *already* become part and parcel of his realty. Therefore, to hold that constructive annexation is sufficient to entitle the landlord to claim the fixture is in effect holding that the article is then a part of the realty, which is directly in opposition to the actual fact. It can hardly be correct upon principle that a mere intention, which may never be given effect, to annex a chattel to the leased premises will give to the lessor, by construction of law, a vested right in the unattached chattel.<sup>16</sup>

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TRADE-MARKS AND UNFAIR COMPETITION.—The rapid development of modern business conditions has served to present the general question of unfair competition in a multitude of forms unknown to the courts of a generation past. An analysis of the many cases would seem to show two broad divisions, namely, a direct infringement of the technical, arbitrary, registered trade-mark, and unfair competition as exemplified in many various and ingenious ways of "dressing up" a certain product, with intent to deceive the general public as to its origin and reputation.

The first broad division presents no difficulty. It is perfectly obvious that injunction and accounting will be granted for the infringement of valid registered trade-marks that combine those qualities calculated to produce a unique, arbitrary and distinctive symbol or device under which a product may be known and marketed.

The second division under this topic is possible of subdivisions into several more or less distinct headings that will be treated under the general title of "unfair competition"—a title that logically includes the first broad division, but one which the earlier development of the law of trade-marks has restricted by the creation of an independent title in the law. The distinction is important, however, for the strict hold acquired by trade-mark terminology upon the judicial mind is discernible in many cases of unfair competition, that have been tried and decided upon theories applicable only to trade-mark cases. This finds illustration in those instances where relief has been denied upon the ground that the characteristic device, symbol, or "dress" peculiar to the goods of the plaintiff did not *ipso facto* constitute a valid trade-mark—without regard to the now firmly established doctrine which relieves against any attempt on the part of the defendant to so market his wares that the public may reasonably be expected to confuse them with the more established product. It is obvious that, in this latter case, the exist-

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<sup>16</sup> Johnson v. McHaffey, 43 Pa. St. 308, 82 Am. Dec. 568.

ence or non-existence of a valid trade-mark is not controlling—any fairly distinctive method of “dressing up” a certain product that is *substantially* imitated by the inferior producer for the purpose of deceiving the public will furnish ground for injunction.

Perhaps the first decision in which this principle found recognition was that rendered in *Knott v. Morgan*,<sup>1</sup> decided in 1836. The plaintiffs ran omnibuses of a peculiar color and dressed their servants in liveries of distinctive appearance. The defendants were enjoined from running omnibuses of like color with servants similarly clothed. Protection was thus given, although, in the nature of things, the plaintiff could not establish any exclusive right in himself. This case proved the forerunner of a multitude of later cases embodying the same fundamental principle; but it will be observed that the subject-matter in question did not constitute vendable goods in the market. It was early decided, however, that color or shape alone, in respect to either certain products or their method of packing, was not subject to exclusive appropriation, and this is obviously a just limitation.<sup>2</sup> This was not extended, however, to those cases where color was combined with some definite, arbitrary design, which, while not constituting a registered trade-mark, retained sufficient individuality to justify restraint of imitation.<sup>3</sup> The next step proved more difficult of solution, but finally resulted in the protection of those articles which had become identified with some peculiar and distinctive method of manufacture by long association in the public mind. The comparatively recent case of *Sampson Cordage Works v. Puritan Cordage Mills*,<sup>4</sup> well illustrates this principle. Here the plaintiff had for many years manufactured window cord of unique appearance, by incorporating a red strand of material with every eleven white ones in the process of weaving. A red spot or design was thus produced at certain intervals along the cord, which gave a permanent and distinctive individuality to his product. A rival manufacturer was enjoined from making window cord of substantially the same appearance when it was proved that any distinguishing labels placed thereon would probably be torn away in the natural course of trade.

The courts were then called upon to grant injunctions in those cases where the plaintiff claimed to have established a secondary meaning to words otherwise purely descriptive. No better illustration is to be found than in the late case of *Kellogg Toasted Corn Flakes Co. v. Quaker Oats Co.*, 235 Fed. 657. Here a salutary dis-

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<sup>1</sup> 2 Keen 213. See also *Weinstock v. Marks*, 109 Cal. 529, 42 Pac. 142, in which case the defendant had erected a building next to the plaintiff's building, identical in appearance with the latter, by virtue of which trade was diverted from the plaintiff through the public's inability to distinguish between the buildings. Held, that the defendant must sufficiently distinguish his store from that of the plaintiff to prevent confusion.

<sup>2</sup> *Moorman v. Hoge*, Fed. Cas. 9783; *Fleishman v. Starky*, 25 Fed. 127; *Mumm v. Kirk*, 40 Fed. 589.

<sup>3</sup> See *Newcomer and Lewis v. Scriven Co.*, 94 C. C. A. 79, 168 Fed. 621.

<sup>4</sup> 211 Fed. 603, L. R. A., 1915F, 1107.

inction was drawn between those cases in which the defendant adopted the same or similar descriptive words as were used by the plaintiff for the purpose of passing off his goods as those of the latter,<sup>5</sup> and where the product was described in good faith, and "dressed" in such manner that confusion was practically impossible.<sup>6</sup> A distinction is to be observed here between so-called "descriptive words" and those words, geographical<sup>7</sup> or personal<sup>8</sup> in their nature, which have come to stand for a particular maker or vendor. When used in good faith and with justification, it is plain that more latitude should be allowed in those cases where the manufacturer of a product adopts the name of the place in which he makes the article, or markets his wares under his own personal name, despite the secondary meaning attached thereto in the public mind by long continued prior user. The gist of the action is not the employment of similar names, but the appropriation of original business; and the exercise of due care to prevent confusion between the old and new products is essential to a defense. The burden of proof, however, lies upon the plaintiff under these circumstances, and the deceitful practices of the defendant must be alleged and proved by him. For practical purposes, however, the courts grant relief under these circumstances in substantially the same manner as indicated above, and the doctrine has been of wide utility and application.

Under the last subdivision of the general head of unfair competition are found those cases where the manufacturer of one product has adopted the technical trade-marks used by another corporation on an article of the same general character, but one which is sufficiently unlike the original as to preclude any assumption that the prior user might suffer from actual competition. The recent case of *Aunt Jemima Mills Co. v. Rigney & Co.*,<sup>9</sup> aptly illustrates this principle. In this case, the defendant appropriated the words "Aunt Jemima" to designate a particular brand of syrup manufactured by him. The plaintiff, incorporated under this phrase, had long used the words as a trade-mark for the flour produced at his mills. In a fairly exhaustive opinion, the court held that no right of action would lie under these circumstances, and based its decision on the ground that, "To sustain a charge of infringement, the owner must have used it [the trade-mark] on goods of the same descriptive properties as the goods sold by the alleged infringer." Many cases are cited to sustain this proposition, among which are to be found several involving much closer analogies. It is submitted

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<sup>5</sup> *Elgin National Watch Co. v. Illinois Watch Co.*, 179 U. S. 665; *Computing Scales Co. v. Standard Computing Scale Co.*, 118 Fed. 965, 55 C. C. A. 459.

<sup>6</sup> *Kellogg Toasted Corn Flakes Co. v. Quaker Oats Co.*, *supra*.

<sup>7</sup> *Powell v. Birmingham Brewery Co.*, 3 Ch. 449.

<sup>8</sup> *Hall's Safe Co. v. Herring-Hall-Marvin Safe Co.*, 74 C. C. A. 361, 146 Fed. 37; *Bates Manufacturing Co. v. Bates Numbering Machine Co.*, 172 Fed. 892.

<sup>9</sup> 234 Fed. 804.

that the constant application of this doctrine does not always best subserve the interests of justice or utility. A case would seem readily possible of conception in which the manufacturer of canned tomatoes had established a national reputation for the excellence of his product under a certain trade-mark, only to find that an inferior producer had adopted the same trade-mark for his canned soups.<sup>10</sup> It is scarcely possible to resist the conviction that the public mind would readily associate the two. Large sums of money spent in advertising the excellent product would redound to the benefit of a substantially similar one, the consumption of which might readily prejudice the ordinary buying public against the more deserving article. It is not contended that the careful buyer would be deceived, or that the practice is illegal, in the technical sense of the word; but, as a practical issue arising out of modern business conditions, it would seem at least unethical and deserving of careful scrutiny by the courts in the light of equity and justice.<sup>11</sup>

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THE EXTENT TO WHICH A MANUFACTURER MAY CONTROL THE PRICES ON RESALE OF HIS PRODUCT.—Much litigation has resulted from attempts on the part of manufacturers to control the prices on resales of the articles manufactured by them.<sup>1</sup> Contracts having this effect fall under the purview of the common law principles governing restraints of trade—which phrase in its full significance, and as here used, includes restraints of competition—and also of the federal Anti-trust Act,<sup>2</sup> the latter operating only when the goods in question are the subject of interstate commerce.<sup>3</sup> In general, the right of alienation is an incident of a general property right, and restraints upon alienation are justly regarded as being obnoxious to public policy, which is best subserved by the greatest possible freedom in traffic. It is upon this ground of public policy that contracts in restraint of trade are held to be invalid.<sup>4</sup>

There are, however, certain classes of contracts which, though they impose restraints upon trade, are excepted from the operation of the general rule. Contracts by which the vendee agrees not to use the property acquired from the vendor in competition with the business retained by the latter constitute one of these classes.<sup>5</sup> Contracts of this nature are permitted; because their operation in en-

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<sup>10</sup> *George v. Smith* (C. C.), 52 Fed. 830 (Canned Salmon and Canned Tomatoes and Peaches); *Borden's Condensed Milk Co. v. Borden Ice Cream Co.*, 201 Fed. 510 (Ice Cream and Milk).

<sup>11</sup> See 4 VA. LAW REV. 75.

<sup>1</sup> It is not intended to review in this note any principles which may apply especially to contracts to control prices on resales of articles manufactured under patents and copyrighted books.

<sup>2</sup> 26 Stat. L. 209, c. 647, U. S. Comp. St., 1901, p. 3200.

<sup>3</sup> *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 226.

<sup>4</sup> *Park & Sons Co. v. Hartman*, 82 C. C. A. 158, 153 Fed. 24, 12 L. R. A. (N. S.) 135, 147. See *United States v. Addyston Pipe & Steel Co.*, 29 C. C. A. 141, 85 Fed. 271, 46 L. R. A. 122.

<sup>5</sup> See note 4, *supra*.